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In The

Supreme Court of the United States

October Term, 1971

No. 71-1863

LOCAL 281, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
ERVIN F. LAMBERT, RUDY COLTON and DUANE KANE,
Petitioners,

—*vs.*—

ANDREW BACKO, MIKE KARAMAN, CASIMIR MACKO,
JAMES BARNO and ERCELL CUMMINGS,
Respondents.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari to The United States Court of Appeals for The Second Circuit

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QUESTIONS PRESENTED

The real issues were:

1. After a Federal Judge in his chambers (Auburn, New York) files a summons and complaint and simultaneously notifies the Court Clerk (Utica, N. Y.) who assigns a Civil Action Number:

(a) May the same Federal Judge in chambers sign a Temporary Restraining Order under Federal Rules of Civil Procedure 65 and provide that it be served only with a copy of the complaint while the summons is being mailed to the Court Clerk for the Clerk's signature and issuance per Federal Rules of Civil Procedure for? Is this Temporary Restraining Order with attached complaint valid if it provides for and is served after the complaint is filed but prior to the summons being signed by the Court Clerk and issued for service?

(b) In order to sustain a jury verdict in a Civil and Criminal Contempt Proceeding based on a finding that a complaint was filed prior to the issuance of the violated Temporary Restraining Order, may the Court take Judicial Notice of what is in the Court Clerk's Index and the handwriting of the Judge as to the filing thereof upon the complaint attached to the Order to Show Cause dated June 6, 1968 which was submitted in evidence at the trial?

2. In the Civil and Criminal Contempt Proceedings for violation of the said Tem-

porary Restraining Order:

(a) May the attorney for the plaintiff and the U.S.A. testify when facts are peculiarly within his knowledge?

(b) Even though not authenticated by the Court Clerk per Federal Rules of Civil Procedure 44 and Federal Rules of Criminal Procedure 27, was it proper to admit as evidence a copy of the Temporary Restraining Order, which carried the actual signature of the Federal Judge when the attorney in whose presence it was signed testified as to its authenticity?

(c) When a person has knowledge of a Temporary Restraining Order must he be served with either the Order or the Complaint, or both, in order to be held responsible for its violation? If so, will the Union also be held to have had knowledge and be held responsible for its violation on the theory that its agents' knowledge is imputed to the Union?

(d) If it is necessary to prove service of the complaint with the Temporary Restraining Order where the Temporary Restraining Order provides for service of a copy of the prior filed complaint, may the jury verdict be upheld on the point of service of the complaint with the Temporary Restraining Order upon:

(i) Testimony of plaintiffs witnesses

that the "Restraining Order" and "Papers", and "This Order and what was in this Order" were served. D. A. 60, 61, 76, 77.

(ii) Testimony of defendants witnesses that "Papers" were served. D. A. 88.

(iii) Judicial notice of the Affidavits of Service filed with the Court Clerk 12 days after service of the Temporary Restraining Order with a complaint was actually served.

3. Doesn't a Federal Court always have the power to issue a Temporary Restraining Order in order to give it time to decide its own power and propriety of issuing an injunction?

4. In a Civil Contempt seeking compensatory damages, are not the legal expenses incurred in the Civil Contempt recoverable as damages?

(a) Where the evidence conclusively shows that the jury only granted legal fees claimed in the Civil Contempt and deleted the legal fees innumerated for the Criminal Contempt by plaintiffs Exhibit No. 6 produced in the Civil Contempt proceeding, was not the Court's erroneous instruction (including the fees for the Criminal Contempt) harmless error?

5. Since lack of a filed complaint was not raised in the evidentiory hearing on July

12, 1968, weren't the defendants foreclosed from contesting the issue in the subsequent Civil and Criminal Contempt Proceedings?

6. Even though the Criminal Contempt proceeding is not instituted in strict compliance with Federal Rule of Criminal Procedure 42 (b), are not the constitutional requirements satisfied where the defendants: (a) know who they are and subject themselves to the Court jurisdiction by appearance personally in Court and by attorney; (b) are aware that a Criminal Contempt is charged; (c) have been informed of the facts. Wasn't non-compliance with Criminal Rule 42(b) waived by failure to make any motion until after the jury was picked and opening statements completed?

STATEMENT OF CASE

1. Pursuant to Section 401 (c) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 481), Andrew Backo et al made a reasonable request of Local 281 at 8:30 A. M. on Monday, June 3, 1968, that Local 281 distribute by mail at the candidate's expense campaign literature in aid of the Plaintiff's candidacy in the election to be held between the hours of 1:00 P.M. and 8:00 P.M. on Thursday, June 6, 1968.

(a) Local 281 refused to distribute by mail the campaign literature which had been prepared at the expense of the Plaintiffs, Backo et al, and which had been presented according to the usual procedure to Local 281 together with envelopes to which Local 281 was to affix the mailing addresses of the members and then mail out (which addresses are not made available to the membership at large). Plaintiff Backo et al had offered to pay the expense of affixing the addresses and the mailing expense.

(b) On June 4, 1968, the Plaintiffs, Andrew Backo et al retained an attorney, (Angelos Peter Romas, Esq.) in order to obtain legal redress and enforcement of their rights. (Defendants-Appellants Appendix to U. S. Court of Appeals, 2d, Page 141 hereinafter referred to as D. A. 141).

2. On the morning of June 6, 1968, Mr. Romas, the attorney for Plaintiffs, Backo et al presented to Judge Edmund Port in his chambers at Auburn, New York, an ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

(hereinafter referred to as TEMPORARY RESTRAINING ORDER OR SHOW CAUSE ORDER) to which was attached a supporting affidavit, summons and complaint.

(a) As of 10:33 A. M. on June 6, 1968, Judge Port signed the submitted Temporary Restraining Order in the form of a Show Cause Order as shown on the said Order (D. A. 235).

(b) As of 10:33 A. M. on June 6, 1968, Judge Port filed the Show Cause Order, summons and complaint in Federal Court at Auburn, New York, and simultaneously telephoned (in the presence of A. P. Romas) W. A. Dwyer, Clerk of the U. S. District Court, Northern District of New York, whose office was in Utica, New York, and directed an entry of all the papers in the Court Clerk's Records in Utica, New York, so as to reflect the filing at Auburn, New York. (D. A. 235). See Criminal Contempt Exhibit #2; Judge Port letter dated June 6, 1968 to W. A. Dwyer, Clerk, U. S. District Court, Utica, New York.

3. The directive provisions of the Show Cause Order are set forth in D. A. 4-5.

4. The Show Cause Order and the Complaint ("the papers") were served upon Mr. Colton, the President and Assistant Business Agent of Local 281, in the presence of Mr. Lambert, the Business Agent of Local 281, just prior to 1:00 P. M. on June 6, 1968, outside

the Local 281 Union Hall just prior to the commencement of the election (D. A. 55-61).

(a) The papers were also served about 7:30 P. M. on June 6, 1968, upon Duane Kane, Vice-President of Local 281, Sebastian Paterniti, Treasurer of Local 281 and Julius Amadio of the Election Committee. (D. A. 58).

5. The Election results of the June 6, 1968 Election, which was held contrary to the Show Cause Order, were announced at the Local 281 Union Meeting held shortly after 8:00 P. M. on June 6, 1968 (D. A. 58-59).

(a) Defendants testified in the civil contempt portion of the September 25-26, 1969 proceedings as to their authority over the election proceeding and as to their participation in the election D. A. 172 and 179, despite contradictory statement on D. A. 165.

(b) Testimony exists as to the type of election held on June 6, 1968. D. A. 58 and 167.

6. On June 12 and 13, 1968, proceedings were held at the United States District Court in and for the Northern District of New York, Federal Building, Auburn, New York, before Hon. Edmund Port, United States District Judge. At the conclusion of said proceedings, a Judgment was rendered and filed on June 17, 1968, in the U. S.

District Court for the Northern District of New York in File No. 68-CV-186, declaring null and void the election held on June 6, 1968 and ordering a new election to be held on June 27, 1968.

7. By virtue of Local 281's holding the Election on June 6, 1968 in violation of the Show Cause Order, the Plaintiff's campaign material as originally prepared became obsolete and new campaign material had to be prepared at an additional expense to the Plaintiffs of $41.60 plus the additional time of approximately 150-200 man hours expended to prepare the same. In addition, Local 281, an unincorporated association, paid out $368.00 to the Election Committee for their services in holding the June 6, 1968 Election in violation of the Show Cause Order. Under New York Law, the members of an unincorporated association have an undivided interest in all the assets. (D. A. 124 and 129).

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8. In order to recover these added expenditures caused by the violation of the June 6, 1968 Show Cause Order and to criminally punish those who had knowledge and violated the Temporary Restraining Order in the Show Cause Order of June 6, 1968, Plaintiffs Backo et al obtained the following series of "ORDER TO SHOW CAUSE AND FOR CON-

TEMPT JUDGMENT" pursuant to Rule 42 of the Rules of the United States District Court for the Northern District of New York:

(a) On July 22, 1968 Judge Port signed an "ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT" which was filed on July 23, 1968 and was made returnable on August 14, 1968 at Auburn, New York. Pursuant to Rule 5-(b) of the Federal Rules of Civil Procedure and Rule 43 of the Rules of U. S. District Court for Northern District of New York, the conformed copy of this ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT was served by mail dated July 26, 1968 and personally on August 2, 1968 on Emory Resseguie, partner of John Hogan, of Pearis, Resseguie, Hogan & Kline, Press Building, Binghamton, New York, the Attorneys for the Defendants named in the original proceeding and who represented them at the proceedings held on June 12 and 13, 1968 in Auburn, New York. Since E. B. Lambert was not a named defendant in the June 1968 summons and complaint the above attorneys would not accept service, personal service could not be obtained upon Ervin B. Lambert because he was evading service, and thus the matter was adjourned, until a new Show Cause Order could be obtained and served upon Ervin B. Lambert.

(b) On August 28, 1968, Judge Edmund Port signed an "AMENDED ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT" returnable on September 23, 1968 in Utica, New York, and pro-

viding for service upon Ervin B. Lambert on or before September 17, 1968; this was filed in the office of the Clerk, Northern District of New York on September 3, 1968. Personal service upon Ervin B. Lambert could not be accomplished. The matter was adjourned.

(c) By letter dated September 19, 1968 addressed to W. A. Dwyer, Clerk of the United States District Court for the Northern District of New York, Thomas McMahon informed the Court that he had been retained as Counsel in the referenced matter. (See letter dated August 8, 1969 to Judge Port - Record on Appeal p. 539).

(d) On October 1, 1968 Judge Edmund Port signed "SECOND AMENDED ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT" which was returnable on October 28, 1968 at Utica, New York. On October 22, 1968, Gerald P. O'Connor, Deputy Marshall, made a return certifying that he could not serve the same upon Ervin B. Lambert.

(e) October 28, 1968, at Utica, New York, Thomas McMahon appeared and submitted Ervin B. Lambert to the jurisdiction of the Court. On Page 1 of the Transcript of October 28, 1968 proceedings (D. A. 39), Mr. McMahon points out that Mr. Lambert was physically present in that Court Room. The parties were requested to submit Briefs, prior to setting the matter for a hearing.

On Page 2 of the Transcript of October 28, 1968 (D. A. 40) Thomas McMahon appears for the other "defendants".

(f) By letter dated November 25, 1968, A. P. Romas, Esq., submits his Brief. By letter dated December 13, 1968, Mr. McMahon declared that he would not submit a Brief but requested a hearing date for a trial at which he would make several additional motions. By letter dated December 24, 1968, A. P. Romas requested that Mr. McMahon make any additional motions in writing in advance of a hearing date. No Motions were ever made.

(g) By letter dated July 23, 1969, Judge Edmund Port appointed Angelos Peter Romas, Esq., as special prosecutor for the criminal contempt.

(h) On Page 17 of the Transcript of Proceedings (D. A. 46) held on October 28, 1968, it was made clear by Mr. Romas that the SECOND AMENDED ORDER TO SHOW CAUSE AND FOR CONTEMPT JUDGMENT covered "And other punishment" and that this was meant to cover a criminal contempt, simultaneously with the civil contempt damages. Thomas McMahon letter dated August 8, 1969 (Record on Appeal p. 539) to Judge Port confirms Defendants' understanding that criminal and civil contempt was involved.

9. On September 24, 1969, a trial was held before Hon. Lloyd F. McMahon, United States

District Judge, before a jury on the criminal contempt. On September 26, 1969, before the same Judge and jury; the said jury found Ervin B. Lambert and Rudy Colton guilty, and all the other defendants not guilty. On September 26, 1969, before the same Judge and jury a civil contempt proceeding was had; a judgment against all of the defendants for $4700.00 was rendered; However, the opinion of Judge McMahon dated December 29, 1969, vacated the verdict as to defendant, Sebastian Paterninti.

10. Defendants appealed to the U. S. Court of Appeals for the second Circuit which affirmed.

Note: "D. A." refers to Defendants' Appendix to Brief submitted to Court of Appeals.

REASONS FOR DENYING WRIT

There has been no error committed below; the procedure adopted below has been approved by prior decision; and there is no conflict in the Circuits Courts.

I

No law is set forth herein on the issues, since these issues involve well settled law shich has been set forth in (1) the Briefs of the Plaintiffs and the U.S.A. which were submitted in the lower Courts; and (2) the decisions of the lower Courts.

II

However, a brief comment will be made on the Petitioners' assertion that there is a direct conflict between Brotherhood of Locomotive Firemen and Enginemen et. al. vs. U. S., 411 F.2d 318 (5th Cir., 1969) and the decision below at 438F.2d 176.

A close reading will reveal that the cases are readily distinguishable and no conflict exists. The Petitioner evidently felt that there was little merit since even the citation was omitted.

In the instant case (Backo), all of the defendants appeared in Court personally and were identified, and were represented by counsel who submitted them to the juris-

diction of the Court.

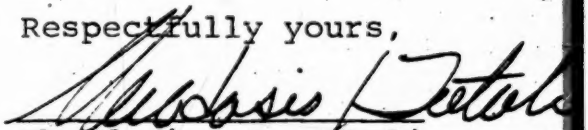
In the Brotherhood case, the alleged individual defendants who were referred to in the caption as "et. al." did not appear in Court individually or by attorney. Only the Labor Union attorney appeared and raised the question as to the identity of the individual defendants.

CONCLUSION

The decisions below were decided correctly on the facts and the law which is well settled.

Certiorari should be denied with costs and disbursements for Respondents herein.

Respectfully yours,



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